KENNETH E. HARDMAN
ATTORNEY AT LAW
DIRECT DIAL: (202) 223-3772 ***5151 WISCONSIN AVENUE, NW, SUITE 312*** ***FACSIMILE: (202) 840-6499***
WASHINGTON, DC 20016-4139
kenhardman.law@gmail.com

EX PARTE MEMORANDUM

September 11, 2018

Marlene H. Dortch, Secretary
Federal Communications Commission
445 – 12th Street, S.W., Room TW-A325
Washington, DC 20554

Re: WT Docket No. 12-40

Dear Secretary Dortch:

On September 10, 2018, the undersigned, representing the Critical Messaging Association, made the following written presentation to Nina Shafran, Senior Attorney, Mobility Division, Wireless Telecommunications Bureau, concerning the above referenced proceeding:

"In the rulemaking implementing the CMRS provisions of the 1993 OBRA, GN Docket No. 93-252, the Commission explicitly recognized that the statutory amendments in OBRA relating to CMRS mandated a system of regulatory symmetry between Part 90 for-hire radio systems and Part 22 common carrier radio systems. OBRA did so by requiring both types of systems to be treated as common carrier systems, subject to comparable regulations.

"Section 90.168 and companion provisions were promulgated as part of the OBRA CMRS implementation rulemaking in order to impose on Part 90 for-hire licensees the same regulations historically imposed on Part 22 common carrier systems. In other words, Section 90.168 and its companions were adopted and applied to Part 90 CMRS licensees (and only Part 90 CMRS licensees) in order to bring them up to the same standards already and historically applied to Part 22 CMRS licensees."

The attachment to the presentation discussing the background of the 1993 OBRA CMRS amendments also is attached hereto.

Respectfully submitted,

s/Kenneth E. Hardman

cc (w/attachment):
Nina Shafran, Esq.

A. *Background of Private Carrier and Common Carrier Licensing*

Historically, the FCC has allocated frequencies for entities providing paging service to the public on a commercial basis under two different parts of its rules: (1) the traditional common carrier systems licensed under Part 22 (the Public Mobile Services), and (2) so-called "private carrier" systems licensed under Part 90 (the Private Land Mobile Radio Services). This bifurcated licensing scheme fostered long-running disputes between the two groups which Congress attempted to end as early as 1982 by enacting Section 332(c)(1) of the Communications Act "to provide a 'clear demarcation between private and common carrier land mobile services.'"[1]

The 1982 amendments did not, however, resolve the controversy between traditional common carriers in the wireless services and competitive forms of licensees in the Private Land Mobile Radio Services. Therefore, Congress tried again in 1993 by amending Section 332(c) as part of the Omnibus Budget Reconciliation Act of 1993. Insofar as pertinent to this case, Congress created a new classification of mobile radio service, the commercial mobile service,[2] and

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[1] *Telocator Network of America v. FCC,* 761 F.2d 763, 765 (DC Cir. 1985), citing H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 54, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2237, 2298. Judge Bork's opinion in the *Telocator* case (at pp. 764-766) traces the background of these disputes up to the passage of the Communications Act Amendments of 1982, which added Section 331(c)(1) to the Communications Act. AAPC adopts Judge Bork's discussion for purposes of this case.

[2] 47 U.S.C. §332(d)(1), defining "commercial mobile service" in relevant part as a mobile service that is "provided for profit and makes interconnected service available (A) to the public

specified that "a person engaged in the provision of a service that is a commercial mobile service" shall be "treated as a common carrier for purposes of [the Communications] Act".[3]

Additionally, Congress enacted two other provisions here relevant that were not codified in the Communications Act. First, in Section 6002(d)(3)(A), 107 Stat. 397, Congress instructed that "Within 1 year after the date of enactment of this Act, the Federal Communications Commission . . . shall issue such modifications or terminations of the regulations applicable (before the date of enactment of this Act) to private land mobile services as are necessary to implement the amendments made by subsection (b)(2)" (*i.e.*, by new Section 332(c) of the Communications Act). This directive was implemented by the FCC conducting a rulemaking proceeding in GN Docket No. 93-252 (the "CMRS" rulemaking).[4]

In the CMRS *Second Report and Order* the FCC determined that the first principal objective of the 1993 OBRA amendments was to adopt "a new approach to the classification of mobile services to ensure that similar services would be

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or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public". Section 332(d)(1) was included in Section 6002(b)(2) of the 1993 OBRA, 107 Stat. 395-396.

[3] 47 U.S.C. §332(c)(1)(A). Section 332(c)(1)(A) similarly was included in Section 6002(b)(2) of the 1993 OBRA, 107 Stat. 393.

[4] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services (First Report and Order),* 9 FCC Rcd 1056 (FCC 1994); *id. (Second Report and Order),* 9 FCC Rcd 1411 (FCC 1994), *Erratum* 9 FCC Rcd 2156 (the CMRS Second Report); *id. (Third Report and Order),* 9 FCC Rcd 7988 (FCC 1994).

subject to consistent regulatory classification,"[5] noting that "[a]lthough commenters may disagree about the extent to which specific mobile services are similar, they almost unanimously agree that *C*ongress intended these provisions of the Budget Act to *create a system of regulatory symmetry.*[6]

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[5] CMRS *Second Report and Order*, 9 FCC Rcd at 1418.

[6] *Id.*, 9 FCC Rcd at 1418, ¶13 & n. 29. (Emphasis added).